Supreme Court, U.S.
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No. 00-1936

In the Supreme Court of the United States

MAHLON W. NEWKIRK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the "appears to be" and the "conveys the impression" prohibitions in the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A, 2256(8)(B) and (D) (Supp. V 1999), violate the First Amendment.

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1) is unpublished, but the decision is noted at 252 F.3d 1363 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2001. The petition for a writ of certiorari was filed on June 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Northern District of Florida to one count of knowingly receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) (Supp. V 1999).

Pet. App. 3. He reserved the right to appeal the district court's determination that the statute, as amended by the Child Pornography Protection Act of 1996 (CPPA), is constitutional. He was sentenced to 16 months' imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. *Id.* at 1.

1. The United States Customs Service created an undercover website where individuals interested in receiving child pornography could obtain additional information by providing their names, addresses, and e-mail addresses. After petitioner requested information, Customs mailed a catalogue to him. Petitioner ordered a child pornography videotape "Family Sex," which the catalogue described as "Mommy & Daddy really teach this 12 year old about sex!" Gov't C.A. Br. 3-5.

A Customs agent posing as a Federal Express driver made a controlled delivery of the videotape to petitioner. Thereafter, pursuant to a search warrant, the videotape was recovered from petitioner's VCR. Agents also found depictions of minors engaged in sexually explicit conduct stored on petitioner's computer. Gov't C.A. Br. 5.

2. Petitioner was indicted on one count charging him with the knowing receipt of child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) (Supp. V 1999). Child pornography is defined to include any visual depiction, including any computer or computer-generated image or picture, that is "or appears to be" of a minor engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(B) (Supp. V 1999), or that is presented in a manner that "conveys the impression" of a minor engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(D) (Supp. V 1999). Child pornography is also defined to include any visual depiction the production of which involves the

use of a minor engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(A) (Supp. V 1999), and any visual depiction that has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(C) (Supp. V 1999).

Petitioner moved to have the CPPA declared unconstitutional. He contended that the CPPA's "appears to be" and "conveys the impression" language rendered the statute vague and overbroad, in violation of the First Amendment. Gov't C.A. Br. 5-6. Petitioner did not assert that the material he possessed failed to depict actual children engaged in sexually explicit conduct. Relying on *United States* v. *Acheson*, 195 F.3d 645 (11th Cir. 1999), which upheld the constitutionality of the CPPA's "appears to be" provision, the district court denied the motion. Pet. App. 3-7. The district court explained that, while *Acheson* addressed only the constitutionality of the CPPA's "appears to be" provision, the "conveys the impression" provision was valid under "the same rationale." *Id.* at 5. Petitioner ultimately entered a conditional plea of guilty, reserving the right to challenge the constitutionality of the CPPA. Gov't C.A. Br. 2.

3. The court of appeals affirmed. Pet. App. 1. The court explained that it had previously upheld the constitutionality of the CPPA in *Acheson*, *supra*.

DISCUSSION

As petitioner points out (Pet. 3-4), there is a circuit conflict on the question whether the CPPA's "appears to be" and "conveys the impression" provisions, 18 U.S.C. 2252A, 2256(8)(B) and (D) (Supp. V 1999), violate the First Amendment. While petitioner's case was on appeal, this Court granted the government's petition for a writ of certiorari in *Ashcroft* v. *Free Speech Coali-*

tion, cert. granted, No. 00-795 (Jan. 22, 2001), to resolve that conflict. Accordingly, the petition in this case should be held pending the Court's decision in *Free Speech Coalition*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Ashcroft* v. *Free Speech Coalition*, cert. granted, No. 00-795 (Jan. 22, 2001), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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